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SERVICE DATE – NOVEMBER 21, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36220

CSX TRANSPORTATION, INC.—LEASE—WESTERN AND ATLANTIC RAILROAD

Digest:¹ This decision accepts for consideration the application by CSX Transportation, Inc. to continue to lease approximately 137.33 miles of rail line of the Western and Atlantic Railroad from the State of Georgia. The Board determines that this is a minor transaction as defined by the Board's regulations and adopts a procedural schedule.

Decided: November 16, 2018

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1 in FD 36220; Notice of Acceptance of Application; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application submitted on October 22, 2018, by CSX Transportation, Inc. (CSXT). CSXT seeks Board approval under 49 U.S.C. § 11323 to continue to lease from the State of Georgia (Georgia) approximately 137.33 miles of rail line of the Western and Atlantic Railroad (W&A), a non-operating carrier owned by Georgia, acting by and through the State Properties Commission, between milepost 0 at Central Avenue in the City of Atlanta, Ga., and milepost 137.28 at the centerline of Interstate 24 in the City of Chattanooga, Tenn. (the Line). On November 2, 2018, Georgia, acting by and through the State Properties Commission, filed a letter in support of CSXT's application.

The Board finds that the proposed transaction (the Lease) is a "minor transaction" under 49 C.F.R. § 1180.2(c) and that the application is complete. The Board adopts a procedural schedule for consideration of the application, under which the Board's final decision would be expected to be issued by April 19, 2019, and would become effective by May 19, 2019.

As a condition to the Lease, CSXT states that it has agreed to seek authority to abandon two lines that are not part of the Line in order to allow Georgia to expand its Silver Comet recreational trail: (1) a 2.32-mile long railroad line between milepost S.G. 579.29 and milepost

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

S.G. 581.61 in Cobb County, Ga., see CSX Transportation, Inc.—Abandonment Exemption—in Cobb County, Ga., AB 55 (Sub-No. 784X); and (2) a 4.3-mile line between milepost S.G. 579.29 and milepost 575.00 in Cobb County, Ga. (Appl. 18.)

DATES: The effective date of this decision is November 21, 2018. Any person who wishes to participate in this proceeding as a party of record (POR) must file a notice of intent to participate no later than December 5, 2018. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by January 4, 2019. Responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Lease, and rebuttal in support of the application must be filed by February 1, 2019.

The Board expects to issue its final decision by April 19, 2019, and to make the decision effective by May 19, 2019. For further information respecting dates, see the Appendix to this decision.

ADDRESSES: Any filing submitted on the transportation merits in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at www.stb.gov at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) U.S. Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Louis E. Gitomer (representing CSXT), Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204; and (4) any other person designated as a POR on the service list notice (as explained below, the service list notice will be issued as soon after December 5, 2018, as practicable).

FOR FURTHER INFORMATION CONTACT: Lisa Novins, (202) 245-0389. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: CSXT is a Class I railroad and W&A is a non-operating Class III railroad that is owned by Georgia, acting by and through the State Properties Commission. (Appl. 3, 5.) According to CSXT, it and its predecessors have been the only railroads operating the Line since 1890. (*Id.* at 4.) CSXT states that it provides overhead and local service over the Line, that the Norfolk Southern Railway Company (NSR) intersects with the Line in Chattanooga, Tenn., and Dalton, Ga.,² and that CSXT interchanges traffic in Elizabeth, Ga., with the Georgia Northeastern Railroad Company, Inc. (GNRR). (*Id.*) CSXT

² CSXT does not indicate whether it interchanges traffic with NSR at these locations.

states that the current lease expires on December 31, 2019, and that the new lease for the Line is for an additional 50 years. (Id. at 14, 17.) CSXT further states that it will retain responsibility for dispatching, track maintenance, capital improvements, and serving shippers under the Lease. (Id. at 14.)

Discontinuances/Abandonments. CSXT states that it does not anticipate discontinuing service over or abandoning the Line or any portion of the Line. (Appl. 18.) However, CSXT has agreed to seek authority to abandon two of its lines that are not part of the Line to allow Georgia to expand its Silver Comet recreational trail, which is a material condition of the Lease. (Appl. 18, citing id. at Ex. 2, Lease, § 11.03.) On October 15, 2018, CSXT filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon the 2.32-mile line between milepost S.G. 579.29 and milepost S.G. 581.61 in Cobb County, Ga. in Docket No. AB 55 (Sub-No. 784X), CSX Transportation, Inc.—Abandonment Exemption—in Cobb County, Ga. Notice of the exemption was served and published in the Federal Register on November 2, 2018 (83 Fed. Reg. 55,232). The exemption is scheduled to become effective on December 2, 2018. CSXT states that, if the abandonment is granted, CSXT intends to enter into a trail use agreement with Georgia under the National Trails System Act, 16 U.S.C. § 1247(d). (Appl. 18.) With respect to the second line,³ CSXT states that, in the Lease, CSXT has granted Georgia or its Department of Transportation a first right of refusal to acquire the 4.3-mile line between milepost S.G. 579.29 and milepost 575.00 in Cobb County, Ga. According to CSXT, that line must be acquired within three years of CSXT obtaining abandonment authority. (Id.)

Financial Arrangements. According to CSXT, no new securities will be issued in connection with the Lease. (Appl. 8.) CSXT states that, under the Lease, CSXT would pay Georgia a monthly rental of \$1,008,333.33, which would increase annually by 2.5% compounded. Additionally, CSXT states that, by July 31 of each year, it would pay Georgia additional rent consisting of 50% of the revenue generated from all agreements, subleases, easements, or licenses attributable to the Line for the previous year. CSXT states that it will not incur any fixed charges as a result of the Lease. (Id. at 10.)

Public Interest Considerations. CSXT states that it expects the transaction to be competitively neutral and that it will not result in any lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. (Appl. 9.) In support, CSXT states that competition with NSR between Atlanta and Chattanooga will be maintained at the current level and that the Lease will not impact motor carriers operating between Atlanta and Chattanooga on Interstate 75 or intermodal competition at intermediate points. (Id.) CSXT further states that the number of rail carriers serving each shipper on the Line will remain the same and that no shipper now being served by two railroads would have its service limited to one railroad. (Id.)

According to CSXT, the Lease will maintain the status quo of the transportation services to rail customers now served by CSXT, as CSXT will continue to serve shippers as it does today.

³ As of the decided date of this decision, CSXT has not filed for abandonment authority for this line.

(Appl. 10.) CSXT states that it will continue to provide essential transportation services as it and its predecessors have done since 1890, and that essential services provided by other carriers will not be affected by the Lease. (Id. at 8, 10.)

CSXT states that, under the Lease, Georgia has reserved rights that may require the relocation of track, but CSXT is confident that its ability to provide adequate transportation service is protected by the terms of the Lease, which states that any track relocation will not “unreasonably interfere with the use by [CSXT] of the Leased Property, or unreasonably reduce [CSXT’s] operating capacity.” (Appl. 10, citing id. at Ex. 2, Lease, § 1.04(c).) Additionally, CSXT states that Georgia has reserved the right to institute passenger rail service over the Line “subject to the mutual agreement of [Georgia] and [CSXT] with respect to the impact any such passenger rail may have upon the safety and capacity of, compensation for, and liability in connection with the [Line].” (Id. at 11, citing id. at Ex. 2, Lease, § 11.01.)

Time Schedule for Consummation. CSXT states that, pursuant to the Lease, the transaction is scheduled to be consummated January 1, 2020. (Appl. 8.)

Environmental Impacts. CSXT states that the Lease does not require environmental documentation and review under 49 C.F.R. § 1105.6(c) because the Lease will not result in CSXT’s operations over the Line exceeding the thresholds in 49 C.F.R. § 1105.7(e)(4) and (5). (Appl. 15-16.)

Historic Preservation Impacts. CSXT states that the Lease does not require an historic report under 49 C.F.R. § 1105.8(b) because the Lease “is for the purpose of continued rail operations where further [Board] approval is required to abandon any service and there are no plans to dispose of or alter properties subject to [Board] jurisdiction that are 50 years or older.” (Appl. 17.) CSXT states that it will continue to operate the Line that it has operated for over 120 years. (Appl. 17.)

Labor Impacts. CSXT states that there will be no impact on its employees or on the employees of W&A, because CSXT does not plan to change operations on the Line. Further, CSXT states that there are no W&A employees on the Line. CSXT requests that the Board impose the labor protective conditions set forth in Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad, 360 I.C.C. 653 (1980), as clarified in Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc., 6 I.C.C.2d 799, 814-826 (1990). (Appl. 11.)

APPLICATION ACCEPTED. A transaction that does not involve the control or merger of two or more Class I railroads is not of regional or national transportation significance, and therefore is classified as “minor” if: (1) the transaction would clearly not have anticompetitive effects, or (2) any anticompetitive effects would clearly be outweighed by the transaction’s contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is “significant” if neither of these determinations can be clearly made. See 49 C.F.R. § 1180.2(b), (c).

Based on a review of the application, the Board finds that the proposed Lease would be a “minor transaction” under 49 C.F.R. § 1180.2(c). Nothing in the record thus far suggests that the Lease would have anticompetitive effects, because the Lease proposes to generally maintain the status quo by allowing CSXT to continue operating over the Line as it and its predecessors have done since 1890. The application indicates that, not only would CSXT continue to operate over the Line, but NSR and GNRR would “retain their existing rights.” (Appl. 6.) It does not appear, under the terms of the proposed Lease, that any shipper would have fewer competitive rail alternatives as a result of the transaction.

The Board’s finding regarding competitive impact is preliminary. The Board will give careful consideration to any claims that any potential anticompetitive effects of the Lease would not be outweighed by its potential benefits.

The Board accepts the application for consideration because it is in substantial compliance with the applicable regulations governing “minor transactions.” See 49 C.F.R. § 1180; 49 U.S.C. §§ 11321-26. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

PROCEDURAL SCHEDULE. Any person who wishes to participate in this proceeding as a POR must file a notice of intent to participate no later than December 5, 2018; requests for discovery from CSXT are due by December 5, 2018; CSXT’s discovery responses are due by December 19, 2018; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by January 4, 2019; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Lease, as well as CSXT’s rebuttal in support of the application, must be filed by February 1, 2019. The Board reserves the right to adjust the schedule as circumstances may warrant. For further information regarding dates, see the Appendix to this decision.

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than December 5, 2018, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the U.S. Secretary of Transportation, the Attorney General of the United States, and Mr. Gitomer (representing CSXT), as described above.

If a request is made in the notice of intent to participate to have more than one name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a “non-party.” The list will reflect the Board’s policy of allowing only one official representative per party to be placed on the service list, as specified in Press Release No. 97-68 dated August 18, 1997, announcing the implementation of the Board’s “One Party-One Representative” policy for service lists. Any person designated as a non-party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 C.F.R. § 1180.4, and any other requirements set forth in this decision.

SERVICE LIST NOTICE. The Board will serve, as soon after December 5, 2018, as practicable, a notice containing the official service list (the service list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service list notices, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR will also be required to file with the Board, within 10 days of the service date of the service list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any MOC or GOV has requested to be, and is designated, as a POR.

SERVICE OF DECISIONS, ORDER, AND NOTICES. The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the official service list as either POR, MOC, GOV, or non-party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at www.stb.gov under "E-LIBRARY/Decisions & Notices."

ACCESS TO FILINGS. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). The application and other filings in this proceeding are available on the Board's website at www.stb.gov under "E-LIBRARY/Filings." In addition, the application may be obtained from Mr. Gitomer at the address indicated above.

It is ordered:

1. The application in FD 36220 is accepted for consideration.
2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix and must comply with the procedural requirements described in this decision.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.

APPENDIX: PROCEDURAL SCHEDULE

October 22, 2018	Application filed.
December 5, 2018	Notices of intent to participate in this proceeding due. Discovery requests due to CSXT.
December 19, 2018	CSXT's responses to discovery requests due.
January 4, 2019	Comments due from all parties, including the U.S. Secretary of Transportation and the Attorney General, on the transportation merits of the Lease.
February 1, 2019	Responses to comments on the transportation merits of the Lease due. CSXT's rebuttal in support of the application due.
March 6, 2019	Close of record on the transportation merits.
April 19, 2019	Date by which a final decision will be served.
May 19, 2019	Date by which a final decision will become effective.